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No. 74-1602

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY POLITI AND HARRY WEIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TO THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that their convictions violated the double jeopardy clause of the Fifth Amendment because they had previously been acquitted on similar charges.

After a jury-waived trial with ten co-defendants[1] in the United States District Court for the Southern District of New York, petitioners were convicted of having operated an illegal gambling business, in violation of 18 U.S.C. 1955 (count 2) and of having conspired to commit that offense in violation of 18 U.S.C. 371 (count 1). Petitioner Politi received sentences of one year's imprisonment on count one and three years' probation on count two; he was also fined $3,750 on count one and $3,750 on count two. Petitioner Weis was sentenced to

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[1]Also named as defendants were Gerald Politi, Philip Politi, Michael Roman, Robert Peters, Alphonse Cuzzo, Arthur Frangello, Leonard Harrison, Lawrence Johnson, Louis Visconti, and Eddie Washington. All were convicted as charged.

concurrent terms of three months' imprisonment and twenty-seven months' probation on each of counts one and two. The court of appeals affirmed (Pet. App. 1a-2a).

The government's proof at trial, which included stipulated testimony of members of the gambling organization and gambling records seized at several policy "banks," established that between September 1970 and January 1973 petitioners and co-defendants participated in a large-scale gambling operation in the Poughkeepsie-Newburgh area of Orange and Dutchess Counties, New York.

At a previous trial under another indictment (71 Cr. 857), petitioners had been acquitted of charges that they conspired to operate and operated an illegal gambling business in Westchester County, New York. Petitioners contend that the double jeopardy clause and the doctrine of collateral estoppel require reversal of their convictions because the instant case and the earlier prosecution involve some of the same defendants and co-conspirators[2] and because the time of the criminal enterprise alleged in the prior case falls within the period of the illegal gambling operation involved here. The court of appeals correctly rejected this contention because the two prosecutions involved "completely different and separate gambling operations—one in Westchester County and the other in the Poughkeepsie-Newburgh area" (Pet. App. 2a, n.*). The two illicit gambling enterprises, which catered to different bettors and kept separate records, were geographically and operationally distinct.

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[2]Petitioners and Philip Politi were defendants and Thomas Collins an unindicted co-conspirator in both cases; Pasquale Maselli was a defendant in 71 Cr. 857 and a co-conspirator here; Michael Roman, Robert Peters, and Alphonse Cuzzo, defendants here, were conspirators in the earlier case. However, 41 persons—20 in the instant case and 21 in 71 Cr. 857—were named in only one case.

Petitioners err in suggesting (Pet. 12) that some evidence introduced at both trials was identical. The defense stipulated (Exh. 38; J. App. 55a[3]) that "the actual evidence presented in 71 Cr. 857 [the earlier prosecution] related solely to gambling in Westchester County," and the district court found that "none of the evidence presented in the earlier case is the same as that offered here" (J. App. 965a). The district court also found that the evidence in neither prosecution would be sufficient to warrant a conviction in the other (J. App. 964a).

The evidence in the instant case included gambling records seized by federal agents executing a search warrant at a cottage at the Bobbin Inn Country Club in Rockland County, New York. Although 24 of the 151 coded account designations appearing in those records also occurred in gambling records introduced into evidence in the Westchester prosecution, there was no indication that the codes had the same meaning in both gambling operations (J. App. 965a). Nevertheless, the government, to avoid any possible double jeopardy question, consented to the codes being stricken from the record (*ibid.*)[4]

Petitioner Politi further contends (Pet. 14) that he was subjected to double jeopardy because after his conviction on federal charges in the instant case, he was convicted in state court on the basis of evidence seized in the search of the Bobbin Inn.[5] There is, however, no

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[3]"J. App." refers to the joint appendix in the court of appeals.

[4]Petitioners mistakenly assert (Pet. 15) that the government consented to having 24 of 151 codes appearing in the gambling records seized at the Bobbin Inn struck from the record because they were "improperly seized." As discussed above, the prosecution consented to the striking of that evidence solely to avoid any double jeopardy question arising from the fact that the same codes appeared in different gambling records introduced at the earlier trial.

[5]On December 3, 1973, petitioner Politi pleaded guilty in state court to promoting gambling (a misdemeanor) and was fined $1,000.

constitutional bar to successive federal and state prosecutions even where substantially the same evidence is introduced at both trials. See *Bartkus* v. *Illinois*, 359 U.S. 121. In any event, even if one assumes that Politi's state conviction violated the double jeopardy clause, the validity of his prior federal conviction is not affected.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.